STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
OWENS. P.J.; GLEICHER AND STEPHENS, J.J.

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION/SEIU; MICHIGAN PUBLIC EMPLOYEES/SEIU LOCAL 517M; MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5; MICHIGAN AFSCME COUNCIL 25; and ANTHONY McNEILL, RAY HOLMAN, ANDREW POTTER, ED CLEMENTS, AMY LIPSET, WILLIAM RUHF, KENNETH MOORE, RUSSELL WATERS, MARK MOZDZEN and KATHLEEN WINE, on behalf of themselves and a similarly situated class,

Plaintiffs-Appellees,

vs.

STATE OF MICHIGAN; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM BOARD; MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; JOHN NIXON, as the Director of the Michigan Department of Technology, Management and Budget; PHIL STODDARD, as the Director of the Office of Retirement Services of the Michigan Department of Technology, Management and Budget; and ANDY DILLON, as the Treasurer of the State of Michigan,

Defendants-Appellants.

Supreme Court No. 147758

Court of Appeals No. 314048

Court of Claims No. 12-17-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

BRIEF ON APPEAL - PLAINTIFFS-APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs-appellees agree with Appellants' Statement of Jurisdiction.

COUNTERSTATEMENT OF QUESTION PRESENTED

Where Article 11, Section 5 of the 1963 Constitution provides that the Commission shall fix rates of compensation in the classified service, and

Where Article 11, Section 5 of the 1963 Constitution provides that the Commission shall regulate all conditions of employment in the classified service, and

Where the Legislature enacted Public Act 264 of 2011 without the approval, consent or cooperation of the Commission, and

Where Public Act 264 of 2011 fixes rates of compensation in the classified service by eliminating a non-contributory defined pension benefit, and

Where Public Act 264 of 2011 regulates a condition of employment in the classified service by eliminating a non-contributory defined pension benefit, and

Where Public Act 264 of 2011 fixes rates of compensation in the classified service by changing the overtime calculation for defined benefit pensions, and

Where Public Act 264 of 2011 regulates a condition of employment in the classified service by changing the overtime calculation for defined benefit pensions,

Whether, Public Act 264 of 2011 violates Article 11, Section 5 of the 1963 Constitution by eliminating a pension benefit and changing the overtime calculation.

The Coalition[1] says "yes."

The Court of Claims said "yes."

The Court of Appeals said "yes."

The CSC says "yes."

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[1] For the convenience of the reader, plaintiffs-appellees use "Coalition" as shorthand both for plaintiff-appellee Michigan Coalition of State Employee Unions and all plaintiffs-appellees, unless the context dictates otherwise. Similarly, the Coalition uses "State" as shorthand for defendants-appellants, unless the context dictates otherwise. The Michigan Civil Service Commission is abbreviated either as "Commission" or "CSC." References to Article 11, Section 5; Article 4, Section 49 and the like are to sections of the 1963 Michigan Constitution.

The State says "no."

INTRODUCTION

The State's argument is essentially that the words of Article 11, Section 5 do not mean what they say. The State bases its argument on an attempt to reconstruct the "intent" of the ratifiers in 1940 and in 1963 with a revisionist version of history. The State omits and mischaracterizes much of the actual history of the civil service amendment. In fact that history shows that the CSC established the retirement plan for classified employees, albeit with the assistance of the Legislature, and until 2010 has taken the lead role in making substantive changes in it. For those reasons we turn first to an accurate recounting of that history.

It supports the decades of case law holding that the CSC's authority over the compensation and other employment conditions of classified employees is plenary and supreme. The Court of Appeals correctly followed that precedent in deciding that PA 264, to the extent it eliminates a non-contributory defined pension benefit and changes the overtime calculation for defined benefit pensions for classified employees, conflicts with Article 11, Section 5 because it fixes "rates of compensation" and regulates "conditions of employment." *Michigan Coalition of Stae Employee Unions v Michigan,* 302 Mich App 187; 838 NW2d 708 (2013).

We also address the Court of Appeals' decision in *UAW v Green,* 302 Mich App 246; 839 NW2d 1 (2013) in which a panel majority decided that the Legislature's authority to enact a "labor law of general applicability" that implicated "public-policy matters in general" under Article 4, Section 49 trumps the CSC's plenary authority under Article 11, Section 5. *UAW v Green* has no application here because Public Act 264 is not a "labor law of general applicability" and does not implicate "public-policy matters in general." 302 Mich App at 278-79. Rather it is aimed directly and solely at employees in the classified service. The public policy concerns are also limited to employees in the classified service. Article 4, Section 49 does not

apply to Public Act 264. Article 11, Section 5 does. Additionally, *UAW v Green* was wrongly decided.

COUNTERSTATEMENT OF FACTS

I. The Creation of a Constitutionally Based, Independent and Uniquely Powerful Civil Service Commission

The people established the CSC as independent from the Legislature in direct response to inefficiencies and unfairness caused by political meddling in state employment.

In 1936 the Governor's Civil Service Study Commission issued a report condemning the extant and longstanding "spoils" or "patronage system." This commission recommended that a state civil service system be established by legislation. *Council No 11, AFSCME v Civil Service Comm*, 408 Mich 385, 397; 292 NW2d 442 (1980). The Legislature did so with 1937 PA 346. However, in 1939 the Legislature weakened the civil service system by passing a number of laws "designed primarily to destroy the civil service system which had just been established" and that had succeeded in "badly crippling" it. 408 Mich at 399. *See also, AFSCME Council 25 v State Employees' Retirement System*, 294 Mich App 1, 10; 818 NW2d 337 (2011), *lv den* 490 Mich 935; 805 NW2d 835 (2011) (detailing the legislative "dismantling" of the CSC). In response, on 5 November 1940 the people of Michigan by initiative petition "adopted a constitutional amendment establishing a constitutional state civil service system, superseding the 1939 legislation." *Council No. 11*, 408 Mich at 400-401. This amendment became Article 6, Section 22 of the 1908 Constitution. (App 1b-2b.) Its third paragraph gave the CSC sole authority to "fix rates of compensation" and "regulate all conditions of employment" – the provisions now in Article 11, Section 5. The 1940 amendment to the 1908 Constitution did not provide for any legislative oversight of the CSC.

The scope of the power the people of Michigan granted the CSC was, and continues to be, unique.

A citizens advisory task force appointed during Governor Milliken's administration found that: "In Michigan, the Commission exercises the function of determining the terms and conditions of employment in the classified civil service usually performed by the legislatures in other states." *Report of the Michigan Citizens Advisory Task Force on Civil Service Reform* (July 1979) at 12. (Exhibit 15 to the CSC's 24 October 2013 amicus brief to this Court.) Accordingly, (at 17) "the Civil Service Commission is responsible for... [making] the rules governing the terms and conditions of employment, and determinations on wages and employee benefits..." And (at 13): "The Constitution's specific and detailed authorizations to the Civil Service Commission produce a role for it which, in part, is essentially legislative in that its rules have the force and effect of law. The Constitution also affords the Commission a unique degree of independence from the Legislature with its guarantee of an annual appropriation."

A citizens advisory task force formed during the administration of Governor Blanchard again recognized that: "Such plenary authority vested in the [CSC] by Constitution is unique among the 50 states." *Citizens Advisory Task Force on State Labor-Management Relations* (September 1987) at 4. (Exhibit 16 to the CSC's 24 October 2013 amicus brief to this Court.)

II. The Civil Service Commission with the Cooperation of the Legislature Establishes a Retirement Plan for State Employees

The CSC met for the first time after the adoption of Article 6, Section 22 on 3 January 1941. (App 3b-6b.) At a meeting on 3 June 1941 the Commission considered for the first time a "proposed classification plan and compensation schedule" and adopted rules. (App 7b-9b, nos. 2 and 3.) Rule XXXVIII reads:

> The Director in conjunction with appointing authorities, other supervising officials, the state budget director and members of the legislature, shall prepare and submit to the commission for approval and subsequent recommendation to the governor and legislature for adoption by law, **a comprehensive and workable contributory retirement system** for employees in the state civil service.

(Emphasis added. App 10b-11b.)[2] In other words, the Commission at its beginning considered wage rates and the establishment of a retirement plan for state employees at the same time.

The CSC then took "the first steps to establish" "a comprehensive and workable contributory retirement system" for state employees. A CSC document entitled "Michigan's Report To The Assembly 1942" reads in relevant part:

> Michigan State government has never had a pension plan for more than a handful of its employees. Realizing the significance of such a retirement plan and the development of a sound career system, the Civil Service Commission has taken the first steps to establish such a plan. The legislation has been partially drafted; the necessary statistical studies are being prepared, and the basic policy questions are in the process of settlement. By January 1, 1943, when the next legislature meets, the pension plan will be completed. Although it will have taken five years to secure a retirement system, Michigan may yet be the first of the states with recently installed civil service systems to establish a retirement system.

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[2] This rule remained largely unchanged until 1963, when the CSC re-wrote it to read: "31.1 Cooperation With State Retirement Board – The state personnel director shall cooperate with the State Employees' Retirement Board in maintaining a comprehensive contributory retirement system for state civil service employees." Its current reiteration at 2-17.1 reads: "Retirement Cooperation with Board - The state personnel director shall cooperate with the state employees' retirement board in maintaining a comprehensive retirement system for classified employees." Since at least 2001 the CSC has also had Rule 5-13 in its chapter on "Compensation and Fringe Benefits" that reads: "Retirement – A classified employee is eligible for retirement benefits as provided by law." (App 12b-14b.)

(App 15b-20b, page 5.) The CSC came close to meeting its 1 January 1943 target for establishing a retirement system for state employees.

On 27 November 1942 the Commission appointed A.G. Gabriel to prepare a "retirement plan for state employees." (App 21b-22b, page 2, number 10.) On 1 February 1943 Thomas Wilson, the State Personnel Director, wrote then Governor Harry Kelly that the CSC had prepared a retirement plan for state employees and put it in the form of draft legislation for presentation to the Legislature and that it was being reviewed by each commissioner:

> Pursuant to your request it is the intention of the Civil Service Commission to complete its work on the proposed retirement plan for state employees and present it to you for your consideration and presentation to the legislature on or about February 10, 1943.
>
> The final draft of the bill is now in the hands of each commissioner for their perusal and correction, if necessary, before passing it on to you.
>
> The bill as it now stands is actuarily sound and was compiled in collaboration with Gabriels of Detroit an outstanding authority on retirement systems.

(App 23b.) On 11 February 1943 the Commission ordered its director to submit the proposed retirement plan to the Governor:

> Mr. A.G. Gabriels, Actuary, appeared before the Commission in connection with the proposed retirement plan for state employees which he had prepared on instructions from them. After considerable discussion, it was moved by Mr. Burke, supported by Mr. Palmer, and unanimously ordered by the Commission that the Director submit to the Governor the proposed retirement plan outlined by Mr. Gabriels for his suggestions and observations prior to final approval by the Commission.

(App 24b, number 2.) Finally, on 18 February 1943, Governor Kelly wrote to the CSC:

> This will acknowledge your letter of February 1st last with reference to proposed bill on the retirement plan for State employees.

> Some few days ago you sent to this office several copies of the revised bill to replace those which you left with us earlier.
>
> I have assigned Dr. Robert Ford, Business Administrator of the staff of the Executive Office, to make a study of the same, and he will undoubtedly communicate with you sometime within the next few days.

(App 25b.)

Meanwhile the Legislature began the legislative process. On 15 February 1943 House Bill 177 was introduced "to provide for a state employees' retirement system..." 1943 Journal of the House 288-289. On 11 March 1943 Senate Bill 292 was introduced "to provide for a state employees' retirement system..." 1943 Journal of the Senate 532-533. On 20 March 1943 the Senate passed Bill 292, twenty-six to zero. On 25 March 1943 the House passed Senate Bill 292, eighty-seven to zero. 1943 Journal of the House 1058-1059. On 22 April 1943 Governor Kelly signed Senate Bill 292. 1943 Journal of the Senate 1126.

The law became effective as Public Act 240 on 31 July 1943 (the "Retirement Act"). It provided at Section 35 that employees would contribute five percent of their compensation up to a specified amount. It also provided at Section 36 that this deduction was agreed to by the employees.[3] (App 26b-27b.) There is no evidence as to any entity other than the CSC and the Legislature having a role in its creation. (The State's discovery response to the request for the chain of relevant documents is at App 28b-33b.)

And all the time that the Commission with the cooperation of the Legislature was putting the retirement plan in place the Commission was, on a necessarily ad hoc basis without any

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[3] When the Retirement Act was amended by 1955 PA 237 to make it compatible with the Federal Social Security Old-Age and Survivors' Insurance Program under which state employees had become covered, the presumptive employee consent provision was included. *AFSCME Council 25*, 294 Mich App at 21.

legislative involvement, placing classified employees on retirement at one-half pay or in one case at a specified amount. (App 34b-53b includes relevant excerpts of minutes of meetings on: (a) 24 March 1942 at page 1, number 4; (b) 20 April 1943 at page 5, number 12; (c) 28 May 1943 at page 4, number 6; (d) 3 August 1943 at page 5, number 12; (e) 27 August 1943 at page 2, number 8; and (f) 23 November 1943 at page 5, number 18. Also included are minutes of the 29 December 1942 meeting at which seventeen employees are ordered to continue their employment "pending final disposition by the Civil Service Commission and the Legislature with regard to a retirement plan." Page 2, number 11.) [4]

III. The 1963 Constitution Retains the Provisions Providing for a Uniquely Powerful Civil Service Commission and Adds a Limited Legislative Veto Power

Prior to the 1963 Constitution, the Commission had "absolute authority to set compensation at any time during the course of a fiscal year without legislative oversight." *Mich Ass'n of Gov't Employees v Civil Service Comm,* 125 Mich App 180, 187; 336 NW2d 463 (1983). The 1963 Constitution continued at Article 11, Section 5 the Commission's sole authority to "fix rates of compensation" and "regulate all conditions of employment." The official comments explain "this [Article 11, Section 5] is a revision of Sec. 22, Article VI, of the [1908] constitution designed to continue Michigan's national leadership among states in public personnel practice, and to foster and encourage a career service in state government." 2 Official Record, Const Conv 1961, p 3405.

Delegates to the 1961 Constitutional Convention and assigned to the Committee on the Executive Branch agreed: "All witnesses advised and the committee was unanimous in deciding

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[4] The CSC continued to exercise authority over retirement benefits after the passage of the Retirement Act on an as needed basis. For example, in 1962 the Commission approved an increase in premiums for retiree health benefits. (App 54b.)

that the civil service merit system should be retained and that the Michigan constitution should contain a detailed civil service provision." 1 Official Record, Const Conv 1961, p 637. While introducing paragraph 4 of Article 11, Section 5 to the convention, this committee explained:

> A substantial majority of the committee recommends that no additional provision leading to direct legislative control or veto of wage determination be added. The legislature has control, as it properly should, of appropriations. Thus there is a control on the total number of dollars expended on salaries for state classified employees.
>
> * * *
>
> The committee believes that quality is preferable to quantity. This the present system tends to accomplish. The feeling is evident, though not absolutely provable, that legislative control of wage rates would ultimately result in the opposite, i.e., the quantity principle being dominant.
>
> * * *
>
> Present and former state legislators appearing before the committee also expressed the view that direct legislative control of wage rates was undesirable because it was likely to result in a chronically depressed wage scale. A modification was proposed to the committee which would establish a system whereby the legislature could veto or adjust by a 2/3 vote of both houses any wage scale established by the civil service commission.

1 Official Record, Const Conv 1961, pp 638-39.

During subsequent debates over whether to amend Article 11, Section 5 to provide the Legislature with a role in the compensation of state employees, delegates on both sides concurred that the Legislature's role in that regard, no matter how defined, should be limited. Delegate Hazen van den Berg Hatch (a Republican on the Committee on Executive Branch), for example, summarized the Legislature's anticipated role:

> I would also call to the delegates' attention the 2 limitations which appear in the language; namely, that any modification would require a vote of 2/3 of the members elect of each house and that the legislature would be further prohibited from reducing rates of

> compensation in effect at the time of the adoption of the rate increase.

2 Official Record, Const Conv 1961, p 3191. This limitation, according to the Committee on the Executive Branch, was expressly included to appease those who believed that the civil service should be accountable to the Legislature in at least some way. 1 Official Record, Const Conv 1961, p 640 (". . . this accountability is provided by granting the legislature a 'veto' power over rate increases proposed by civil service."). According to Delegate Hatch, it was their "hope that this language [providing for the legislative veto power] would lead to a greater understanding between civil service and the legislature, and ultimately mutual respect for one another, which apparently has been lacking in the past." *Id.*

Delegate Tom Downs (a Democrat and Vice President and member of Committee on Emerging Problems), spoke to the limited role of the legislative and executive branches with respect to the compensation of state employees:

> I am very concerned that when the state is in a financial crisis there would be an harassment operation where certain legislators might try to use state employees' pay rates as a whipping boy to attempt to solve the financial problems. Now, this would be unsound from the viewpoint of the employee because he would not know what his pay rate was and there would be the tendency to have it not on a career, professional basis but injected into the partisan aspect of government where it does not belong. Wages should be set for government workers not on the basis of a deficit or surplus in the state treasury but on a professional career basis.

2 Official Record, Const Conv 1961, p 3192.

Delegate D. Hale Brake (a Republican and Chair of the Committee on Finance and Taxation), agreed that the Legislature's role was to be expressly limited: "There was no intention on my part and I am sure there was not on the others that the legislature should be allowed to

juggle salaries and put a cut here and a raise there. That would be improper and should not be permitted." *Id.*

The framers ultimately did add a "narrowly drawn" legislative veto power over CSC determinations over increases in rates of compensation by a two/thirds vote of both houses. *Michigan Ass 'n of Gov't Employees*, 125 Mich App at 189. The framers recognized how narrowly they had drawn the powers of the Legislature in this area. 1 Official Record, Const Conv 1961, p. 652 (noting that as a practical matter the two/thirds requirement would mean the veto power "could not be exercised readily" and would only be exercised "in the event of a real abuse").

The framers also added a new provision in Article 11, Section 5, requiring the Commission to furnish annual reports of expenditures to the Governor and the Legislature and be subject to an annual audit. The powers of the CSC are self-contained in Article 11, Section 5, and neither require nor permit implementation by the Legislature.

IV. The Commission with the Cooperation of the Legislature Establishes a Non-contributory Retirement Plan

On 18 July 1973 state employees, through the unions that represented them, submitted a resolution to the Commission urging it to exercise its authority to fix retirement benefits for state employees. (App 55b-58b at pages 2-4, number 7.) On 4 December 1973 the Commission approved the creation of a non-contributory retirement plan. The relevant minutes read: "Commissioner Robinson moved that the following pay actions be approved: (2) A non-contributing retirement plan for all state employees at a cost of $16,600,000." (App 59b-70b, p 2.)

The Attorney General agreed in two opinions that the Commission had the constitutional authority to do this: First: "if the Civil Service Commission, in its judgment, adopts a retirement

program as part of the rate of compensation for positions in the classified civil service, such action will represent an increase in the rates of compensation and will be subject to rejection or reduction by the legislature as specified in Const 1963, art 11, § 5." OAG letter to State Personnel Director, Sydney Singer (11 January 1974). (App 71b-72b.) Second: "The commission ... has the authority to determine that classified employees, as part of their compensation will receive retirement benefits on a noncontributory basis." OAG letter to Hon. Dan Angel, State Rep. (8 February 1974). (App 73b-74b.)[5] Again, as in 1943, the Legislature cooperated and acted in conjunction with the Commission by amending the Retirement Act to comply with the Commission's approval of the establishment of a non-contributory retirement plan. See Public Act 216 of 1974.

V. The Legislature's First Attempt to Circumvent the Constitutional Authority of the Commission – 2010

No substantive changes were made in the Retirement Act for current state employees[6] between 1974 and 2010. In 2010 the Legislature unsuccessfully attempted, pursuant to its powers

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[5] The Attorney General had previously ruled that the CSC's constitutional authority "to `fix rates of compensation for all classes of positions,' included within it the power to adopt a pension program for state classified employees since fringe benefits, including pension benefits, are included within the term 'compensation.'" OAG 1971-1972, No 4732, p 66 (29 December 1971). (App 75b-78b.) It remains the position of the Attorney General (excluding the briefing in this case) that "the term 'compensation' in Article XI, Section 5 of the Michigan Constitution, includes fringe benefits, such as health care benefits." (The 3 March 2011 Senate Fiscal Agency's analysis of Senate Concurrent Resolution 9 rejecting "the proposed increase in rates of compensation recommended by the Civil Service Commission and contained in the Executive Budget for fiscal year 2011-12 relative to the extension of health benefits to adults and their dependents living with but not related to a State classified employee" makes reference to this opinion. App 79b-80b).

[6] In 1996 the Legislature closed the retirement fund to new members. Public Act 216 of 1996. This did not impact existing state employees over whom the Commission had jurisdiction. Rather effective 31 March 1997 all new employees became members of the state's newly established defined contribution plan.

under Article 11, Section 5, to override a three percent wage increase that plaintiff unions had negotiated for their members (after a one percent increase in total in the preceding two years). The Legislature then enacted 2010 PA 185, MCL 38.35, and 2010 PA 77, MCL 38.2731 *et seq.* Together these acts required a three percent contribution from State employees into an employee retirement healthcare fund.

The plaintiff unions and others sued. On 22 February 2011 the Court of Claims held that MCL 38.35 violated Article 11, Section 5. Court of Claims No. 10-110-MM. The Court of Appeals affirmed, rejecting the State's argument "that the regulation of the retirement system was within the province of the Legislature ...." *AFSCME Council 25*, 294 Mich App at 5. The Court of Appeals found that requiring classified employees to make a contribution to a retiree healthcare fund constituted a decrease in their rate of compensation. This Court denied an application for leave to appeal. 490 Mich 935 (2011).

VI. The Legislature's Second Attempt to Circumvent the Constitutional Authority of the Commission – 2011

From August to October 2011, the Coalition bargained with the Office of the State Employer for successor collective bargaining agreements for each of the five plaintiff unions, ultimately reaching agreements that were effective 1 January 2012 for non-economic terms and 1 October 2012 for economic terms and that expired 31 December 2013. The Coalition in this bargaining sought to bargain about retirement benefits for current employees. The State deferred to the CSC and no such bargaining occurred. On various dates in latter 2011 the members of plaintiff unions ratified these agreements. (Admitted at paragraphs 50-52 of answer. The complaint without its attachment is at App 81b-95b. The answer is at App 96b-110b.)

These agreements provide for: (a) a one percent increase in rates of compensation in October 2012, (b) in 2012 a lump sum payment of one percent of compensation that will not increase the compensation rate, (c) in 2013 another such one percent lump sum 15 payment, and (d) increases in the amount of the health care premium paid by employees hired before April 2010 from five to fifteen percent for those in the health maintenance organization and from ten to twenty percent for those in the State health plan. These agreements do not provide for any of the changes in conditions of employment the Legislature made by enacting PA 264. (Admitted at paragraphs 53-54 of answer.)

On 15 December 2011 the CSC approved the terms of each of these agreements.[7] (App 111b-117b, pages 3 to 5.) Enacted and given effect the same day -- 15 December 2011 -- the Legislature amended the Retirement Act with PA 264. (Admitted at paragraph 56 of answer.)

The House Fiscal Agency summarized the changes this legislation made to the benefits of state employees:

- Eliminate the 3% employee contribution for retiree health care required of all employees since 2010 and refund contributions to employees. [8]

- Require employees in the SERS pension, or defined benefit (DB), plan to choose between remaining in the plan and contributing 4% of their compensation toward the plan or freezing their pension benefit and continuing their future service under the SERS 401(k), or defined contribution (DC), plan.

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[7] The CSC can reject, in whole or in part, any collective bargaining agreement that the State and a union negotiate. See Civil Service Commission Rules 6-2.1(c), 6-3.1(a) and (b). If the CSC approves the agreement it is binding on the State and the union.

[8] This change was of no legal effect because on 14 December 2011, the day before the effective date of this legislation, this Court, at 490 Mich 935, denied the State leave to appeal from the Court of Appeals decision, discussed in text above, that declared the requirement unconstitutional. [Footnote added to quoted text.]

- Eliminate retiree health insurance for employees hired on or after January 1, 2012, and replace it with a 401(k) or 457 plan employer match option of up to 2% of compensation plus a lump sum deposit of either $1,000 or $2,000 into a Health Reimbursement Account (HRA) upon termination of employment.

- Provide existing DC plan employees (hired between March 31, 1997 and December 31, 2011) the option of retaining the current retirement graded premium health insurance plan or switching to the 401(k) or 457 plan employer match option of up to 2% of compensation. Employees who chose to switch plans would receive a lump sum contribution into either their 401(k) or 457 plan upon separation from the State in lieu of the retiree health insurance benefits they had already earned based on current service. The lump sum amount would be calculated as described in detail below.

- Allow employees who receive the 2% employer matching contribution in lieu of health benefits to purchase health care coverage from the State's health care plans upon retirement or separation from the state.

- Prohibit employees from borrowing the employer matching contribution for retiree health care deposited in their tax-deferred accounts.

- Maintains overtime pay in compensation for the purposes of calculating an employee's pension, but beginning January 1, 2012, would use a 6-year average of overtime pay, rather than a 3-year average used for other compensation.

- Revise current DC matching provisions to create an automatic enrollment for employee contributions up to the state matching provisions and allow the state to match employee contributions into a 457 plan as well as the current 401(k) plans.

- Establish HRAs for employees within the irrevocable health care trusts established in 2010 to receive and hold employer and employee contributions for retiree health benefits or reimbursement of medical expenses.

(App 118b-127b.)

The Legislature made these changes without the approval or consent of the CSC and without input from the CSC. (Admitted at paragraph 58 of answer.)

By enacting PA 264 the Legislature at the same time it purported to remove the three percent employee contribution into the retiree healthcare benefits fund requirement from MCL 38.35 substituted a four percent employee contribution requirement on all employees in the defined benefit plan as a condition of continuing their participation in the plan. PA 264 does not state that the changes contained therein were agreed to between the Legislature and employees, as the original Retirement Act did. (Admitted at paragraph 61 of answer.) And in fact, as described above, the employees did not agree to these changes.

COUNTERSTATEMENT OF PROCEEDINGS

The State's statement of proceedings (at pages 10 and 11) regarding the Court of Claims decision and order is in all material respects correct. (App 147a-158a.) To summarize, the Court of Claims: (1) determined on cross motions for summary disposition that 2011 PA 264 conflicts with Article 11, Section 5 to the extent it eliminates a non-contributory defined pension benefit (at MCL 38.35a) and changes the overtime calculation for defined benefit pensions (at MCL 38.1e); (2) dismissed without prejudice the remainder of the claims regarding the constitutionality of 2011 PA 264; and (3) by stipulated order allowed the State to continue to apply MCL 38.35a and 38.1e pending appeal. (App 147a-158a and 164a-175a.)

The State's statement of proceedings (at pages 11 and 12) regarding the Court of Appeals is, likewise, correct in all material respects. To summarize, the Court of Appeals: (1) affirmed the Court of Claims determination that in enacting 2011 PA 264 the Legislature usurped the Commission's constitutional authority to fix rates of compensation and regulate conditions of to the extent it eliminated a non-contributory defined pension benefit and changed the overtime calculation for defined benefit pensions (2) reversed to the extent that the Court of Claims

declared 2011 PA 264 void[9]; and (3) remanded the case to the trial court for a severability determination under MCL 8.5. *Michigan Coalition of State Employee Unions v Michigan, supra.*

ARGUMENT

I. The CSC's Authority Over the Compensation and Other Employment Conditions of State Employees Is Plenary and Supreme

Given the above-described history it is not surprising that this Court has recognized repeatedly, and used expansive language in doing so, that the CSC's authority over State employees under Article 11, Section 5 is plenary and supreme. *See, e.g., Council No 11, AFSCME*, 408 Mich at 408 (the CSC is "vested with plenary powers" under Article 11, Section 5) and *Viculin v Dep't of Civil Service*, 386 Mich 375, 398; 192 NW2d 449 (1971). The Court of Appeals has consistently followed this Court's mandate concerning the CSC's plenary authority under Article 11, Section 5. *See, e.g., York v Civil Service Comm*, 263 Mich App 694, 700; 689 NW2d 533 (2004) (CSC has "broad authority to regulate the state classified service;" it has power that is "absolute" and "plenary."); *Womack-Scott v Department of Corrections*, 246 Mich App 70, 79; 630 NW2d 650 (2001) (the CSC "regulates the terms and conditions of employment in the classified service and has plenary and absolute authority in that respect."); *Hanlon v Civil Service Comm*, 253 Mich App 710, 717-18; 660 NW2d 74 (2002) ("the CSC has broad authority

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[9] It is unclear that the Court of Claims had intended to declare 2011 PA 264 void in its entirety. In its 25 September 2012 decision and order, after determining that "the only claim sought to be adjudicated by Plaintiffs was the unconstitutionality of PA 264 based on the required four percent wage deduction" the court concluded: "The Court finds that Plaintiffs are entitled to summary disposition pursuant to MCR 2.116(C)(10) because Public Act 264 of 2011 clearly conflicts with art. 11, § 5 of the Michigan Constitution. 'When a statute contravenes the provisions of the Michigan Constitution, it is unconstitutional and void.' *AFSCME Council 25, id* at 29." (App 157a-158a.) In its orders of 14 December 2012 the court granted plaintiffs' partial summary judgment declaring the overtime provision of 2011 PA 264 unconstitutional and dismissed without prejudice plaintiffs' claims regarding the constitutionality of 2011 PA 264 "except for the claims adjudicated by this Court's orders of September 25, 2012 and December 14, 2012." (App 169a-173a.)

to regulate the state classified service" and has "plenary authority."); *MSEA v Civil Service Comm*, 220 Mich App 220, 223;559 NW2d 65 (1996) ("Pursuant to Const. 1963, art. 11, §5, the Civil Service Commission has plenary authority to regulate the conditions of employment for classified state employees."); and more recently, *AFSCME Council 25, supra,* 294 Mich App at 15 (the CSC "has absolute power in its field.).

Nor does adding the power of the Legislature to the mix affect the result. *Council No 11, AFSCME,* 408 Mich at 408 ("[s]ince that grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion [into the CSC's sphere of authority] would be unavailing"); *In re Advisory Opinion*, 400 Mich 311, 317-318 (1977) ("[t]he Michigan Constitution is not a grant of power to the Legislature as is the United States Constitution but rather, it is a limitation on general legislative power."); *Crider v State*, 110 Mich App 702, 723; 313 NW2d 367 (1981) ("[I]t is the Civil Service Commission, not the Legislature that is given 'supreme power' over civil service employees under art. 11, §5."); *Hanlon*, 253 Mich App at 717-718 ("Because the CSC's power and authority is derived from the constitution, its valid exercise of that power cannot be taken away by the Legislature"); and *Comm'r of Insurance v Advisory Bd of Michigan State Accident Fund*, 173 Mich App 566, 583; 434 NW2d 433 (1988) ("The legislature cannot by statute usurp the constitutional authority of the State Civil Service Commission.")

Examples of judicial recognition of the plenary and supreme power of the CSC and the lack of power in the Legislature as regards the compensation and other employment conditions of state employees are many. For one: Shortly after passage of the civil service amendment the CSC authorized certain wage increases and the Legislature sought to indirectly limit some of them by passing an act that prohibited appropriations for wages higher than those that existed as

of a certain date. This Court held, in *Civil Service Comm v Auditor General,* 302 Mich 673, 687; 5 NW2d 536 (1942), that the conditions the Legislature sought to impose were unconstitutional because it sought "to usurp the authority vested in the civil service commission by the constitutional amendment to fix rates of compensation of employees of the State who are under civil service classification." For another: *Kunzig v Liquor Control Comm*, 327 Mich 474; 42 NW2d 247 (1950), presented the question whether the Liquor Control Commission had the authority to abolish a position in the state classified service. This Court concluded that it did not, that responsibility, according to Article 11, Section 5, being exclusively that of the CSC. More recently, as described above in *AFSCME Council 25, supra*, the Court of Appeals invalidated 2010 PA 185, which required state employees to contribute 3% of their compensation to a retiree healthcare trust. 294 Mich App at 28-29 ("[T]he Legislature did not achieve its goal of preventing the wage increase in accordance with the constitutional provisions. Therefore, it enacted MCL 38.35 [2010 PA 1851] to fill a budget deficit. When a statute contravenes the provisions of the Michigan Constitution, it is unconstitutional and void.") Most recently in *Attorney General v Civil Service Commission*, No. 306685, 2013 WL 85805, at *4 (8 January 2013), *lv den* 493 Mich 974; 829 NW2d 867 (2013) (holding that extension of State Health Plan to other eligible adult individuals qualified as "compensation" such that Commission had authority to implement policy despite legislative disapproval) (unpublished) (copy attached), the Court of Appeals reaffirmed the CSC's "plenary" and "exclusive" authority over classified employees' conditions of employment.[10]

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[10] Consistent with the decisions of Michigan courts, the Attorney General has repeatedly opined that the CSC has plenary authority to regulate various conditions of employment in the classified service, and that therefore the Legislature has no authority to regulate state employees' conditions of employment. See, e.g., OAG No 6027 (Jan. 1982) (CSC "establishes the terms and

II. The Court of Appeals Correctly Decided that PA 264 Conflicts with Article 11, Section 5 of the Constitution Because It Fixes "Rates of Compensation" And Regulates "Conditions of Employment"

In interpreting the Michigan Constitution, a court's "primary objective" must be to "realize the intent of the people by whom and for whom the constitution was ratified." *Wayne County v Hancock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). This is first done by "discern[ing] the common understanding of constitutional text by applying each term's plain meaning at the time of ratification." *Id.* Accord, *Studier v MPSERB*, 472 Mich 642, 652; 698 NW2d 350 (2005). The clearest way to ascertain this meaning is to look at the text's "natural, common, and most obvious meaning, strictly construed and limited to the objects fairly within its terms, as gathered both from the section of which it forms a part and a general purview of the whole context." *Clearwater Twp v Rd of Supervisors of Kalkaska Co*, 187 Mich 516, 525; 53 NW 824 (1915). In so doing, "it is not to be supposed that [the people] have looked for any abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was

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conditions of employment within the classified service," and under such authority has power to determine royalties state employees may receive from inventions developed in the course of their employment and patented by the state); OAG No 6003 (Oct. 1981) (CSC's plenary authority over conditions of employment includes power to subpoena witnesses to appear and give testimony in cases before the Commission); OAG No 5736 (July 1980) (proposed legislation purporting to prohibit discipline by employers against whistleblowers "in so far as they pertain to employees in the classified service, would violate Const 1963 art 11, § 5. The Legislature is without authority to regulate conditions of employment of employees in the classified state service. It has no authority to regulate dismissals and discipline within the classified state service and to enable classified employees to file specified original actions in court in derogation of the grievance procedure established by the Civil Service Commission"); OAG No 5663 (Feb. 1980) ("Classified Executive Service" plan proposed by Legislature as separate merit system for higher level managers in the state workforce would encroach on CSC's plenary power over conditions of employment, and therefore "does not conform to the Civil Service system which the people have established in our Constitution").

the sense designed to be conveyed." *Traverse City School Dist v. Attorney Gen*, 384 Mich 390, 405; 185 NW2d 9 (1971). And "[t]o clarify the meaning of the constitutional provision, the court may examine the circumstances surrounding the adoption of the provision and the purpose sought to be achieved. *Id.*

Article 11, Section 5, paragraph 4 provides that the Commission shall "fix rates of compensation" for State employees. The definition of "fix" is "to settle definitely." *Random House Webster's College Dictionary* (1973), p 499. "Rate" is defined as "the amount of a charge or payment with reference to some basis of calculation." *Id.* at 1095. The Court of Appeals in *AFSCME Council 25, supra*, used the Random House Webster's College Dictionary definition of "compensation" as "something given or received for services, debt, loss, injury, etc." *AFSCME, Council 25*, 294 Mich App at 23.[11] When these definitions are combined, the 1963 Constitution dictates that the Commission shall (1) "settle definitely;" (2) all "amounts of a charge or payment;" (3) that are "given or received for services, debt, loss, injury, etc." The measures taken in 2011 PA 264, to eliminate a non-contributory defined pension benefit (at MCL 38.35a) and change the overtime calculation for defined benefit pensions (at MCL 38.1e) come within these definitions of the words "fix rates of compensation" the framers of Article 11, Section 5 used.

And Attorney General opinions spanning the last forty years reinforce the dictionary definition of the term "compensation" as including pension benefits. (App 67b-74b.) In 1971, the Attorney General opined that the CSC's constitutional authority "to 'fix rates of compensation

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[11] The Court of Appeals' opinion here also cites to its *AFSCME, Council 25* decision relying on the definition of "compensation" from *Random House Webster's College Dictionary*, and further finding that definition to be consistent with this Court's analysis in *Kane v City of Flint*, 342 Mich 74; 69 NW2d 156 (1955) holding that the term "compensation" included retirement pensions. 302 Mich App at 716-717.

for all classes of positions,' includes within it the power to adopt a pension program for state classified employees since fringe benefits, including pension benefits, are included within the term 'compensation.'" (App 71b-74b.) The Attorney General recently reiterated, "the term 'compensation' in Article XI, Section 5 of the Michigan Constitution, includes fringe benefits, such as health care benefits." (App 75b.)[12] If the extension of health benefits to adults living with but not related to a State employee constitutes compensation, providing a fully paid defined benefit pension plan does too, as does changing the calculation for pension amounts.

And in addition to the Commission's power to "fix rates of compensation" the framers included a broad catchall provision that provides the Commission with the power to "regulate all conditions of employment." Eliminating a non-contributory defined pension benefit and changing the overtime calculation for defined benefit pensions each constitute regulating a "condition of employment" under any imaginable definition of those three words.

Since a Court's task is to search for intended meaning, it is sometimes necessary to "consider the circumstances surrounding the adoption of the provision and the purpose it is designed to accomplish." *Federated Publications v Michigan State Univ Bd of Trustees*, 460 Mich 75, 85; 594 NW2d 491 (1999). Accord, *Council No 11, AFSCME*, 408 Mich at 399 quoted with approval in *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich

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[12] Based on this opinion the Michigan Senate passed by a two/thirds vote Senate Concurrent Resolution No 9 rejecting the CSC decision allowing state employees who do not have an eligible spouse to enroll one unrelated adult and that adult's dependents for health benefits. 2011 Journal of the Senate 277. The Michigan House came up a few votes short (66 yeas and 41 nays). 2011 Journal of the House 464. The point being that the Legislature knows that "compensation," within the meaning of Article 11, Section 5, includes fringe benefits. And a fully paid defined benefit pension plan is a fringe benefit, as is an advantageous manner of calculating the overtime provisions of a pension benefit.

212; 634 NW2d 692 (2001). Finally, no constitutional provision may be construed to nullify or impair another. *Lapeer Co Clerk v Lapeer Co*, 469 Mich 146, 156; 665 NW2d 452 (2003).

Here the circumstances and purpose surrounding the adoption of the 1941 amendment to the 1908 Constitution, as described above, could hardly be clearer. The Legislature was meddling with the civil service system through legislation and had succeeded in "badly crippling" it. *Council No 11, AFSCME,* 408 Mich at 399. Those concerns were carried forward by the framers of the 1963 Constitution as is made clear by the history of its enactment described in detail above. The framers' purpose in providing the CSC with broad constitutional powers was to remove the Legislature from the business of regulating the terms of employment of State employees, exactly what the Legislature is back in the business of doing with PA 264 by eliminating a non-contributory defined pension benefit (at MCL 38.35a) and changing the overtime calculation for defined benefit pensions (at MCL 38.1e).

III. *UAW v Green* Is Inapposite as PA 264 Is Neither a Law of General Applicability Nor Does It Concern an Issue Uniquely within the Province of the Legislature

The Court of Appeals in *UAW v Green* found that 2012 PA 349 – the public sector "right-to-work" law that by its terms covers all public employees (as its companion statute, 2012 PA 348, covers all private employees) -- as applied to classified civil service was a valid exercise of the Legislature's authority under Article 4, Section 49 of the 1963 Constitution and did not infringe on the CSC's plenary authority to regulate conditions of employment under Article 11, Section 5. The State (at pages 39-44) argues that *UAW v Green, supra,* supports its position here. It does not.

The panel majority made clear throughout and particularly at the conclusion of its opinion that its holding was premised on the Legislature's authority to enact a "labor law of

general applicability" that implicated "public-policy matters in general" under Article 4, Section 49. The following is the Court's full description of what it was holding:

> Accordingly, we hold that, contrary to plaintiffs' claim, it is within the authority of the Legislature **to pass laws on public-policy matters in general** and particularly those, as here, that unquestionably implicate constitutional rights of both union and nonunion public employees. The language of Const. 1963, art. 11, § 5, the history of civil service laws in the state of Michigan, and the ***279** language of Const. 1963, art.4, §§ 48 and 49 do not preclude the Legislature from enacting PA 349 and applying this statute to the classified civil service. The CSC's power to regulate civil service employment does not infringe on the legislative power under article 4, § 49 to enact laws relative to conditions of employment, and **applying those laws toward all employment in the state, public and private, civil service or not civil service**. Finally, Michigan caselaw fully supports the principle that the Legislature, as the policymaking branch of government, has the **power to pass labor laws of general applicability** that also apply to classified civil service employees. For these reasons, we hold that 2012 PA 349 is constitutional as applied to classified civil service positions in Michigan.

302 Mich App at 278-79. (Emphasis added.) Judge Saad said it three times.[13]

The State (at page 41) attempts to place itself within this holding by stating: "PA 264 applies to both civil service employees and non-civil service employees." True, but misleading. Section 13 of the Retirement Act provides that: "Except as otherwise provided in this act, membership in the retirement system consists of state employees occupying permanent positions

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[13] And Judge Saad likely said it because the only caselaw that even arguably supports his decision so holds: "defendants' position is supported by caselaw holding that laws of general application do not encroach on the CSC's jurisdiction when applied to civil service employees." 302 Mich App at 273. In fairness, Judge Saad in this section of his opinion asserts that *Council 11* also is supportive. 302 Mich App at 269-71. He does not explain how it supports his position beyond being a prior instance where a statute trumped a CSC rule. In fact *Council 11* does not support the panel majority as we show ahead in text.

in the state civil service. All state employees except those specifically excluded by law and those who are members or eligible to be members of other statutory retirement systems in this state, shall become members of the retirement system." MCL 38.13(1). The State having decided to allow into its civil service retirement system a limited number of non-classified employees who have no other retirement system is not of constitutional significance – it does not make the Retirement Act a law "of general applicability" within the holding or the facts or the logic or the policy of *UAW v Green.* And to so extend *UAW v Green* would truly eviscerate Article 11, Section 5.

The panel majority also headed a section of its opinion: "E. THIS ISSUE IS UNIQUELY WITHIN THE PROVINCE OF THE LEGISLATURE." 302 Mich App at 274. In this section it described the "fair share" agreements as implicating "significant constitutional ["First Amendment"] and public-policy ["civil liberties"] questions." 302 Mich App at 275. It cited United States Supreme Court law to support its conclusion that "agency fees implicate governmental employees' constitutional rights and important questions of public policy." 302 Mich App at 278. The State does not and cannot point to any constitutional rights or public policy questions at issue here analogous to those present in *UAW v Green.* There are no United States Supreme Court cases it can point to. Nor is there anything unique about the issue present here (whether classified employees should be required to contribute four percent of their earned salary to their pension fund), let alone uniquely within the province of the Legislature. The Court of Appeals dealt with essentially the same issue very recently. *AFSCME, Council 25, supra.*

UAW v Green is not on point. PA 264 is not a law of general applicability. Nor does it concern an issue uniquely within the province of the Legislature.

IV. *UAW v Green* was Wrongly Decided

The *UAW v Green* decision is flawed for multiple reasons.

First, it ignores this Court's well-settled rule that "when there is conflict between general [Article 4, Section 49] and specific [Article 11, Section 5] provisions in a constitution, the specific provision must control." *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 639-40; 272 NW2d 495 (1978). The rule is "grounded on the premise that a specific provision must prevail with respect to its subject matter, since it is regarded as a limitation on the general provision's grant of authority." *Id.* at 640 (internal citations omitted).

Second, it ignores the historical context of Article 4, Section 49 and the provision's interplay with Article 11, Section 5. Article 4, Section 49, substantially identical to its predecessor, Article 5, Section 29 of the 1908 Constitution, was intended to preserve the Legislature's power to enact general legislation limiting working hours, prohibiting child labor, safeguarding minimal working conditions, and the like. Subsequent convention debates confirm that in retaining the provision, the delegates were concerned about protecting the hours and working conditions for men, women, and children of the state. 2 Official Record of 1961 Const Conv at 2062-63. Article 4, Section 49 is a general provision concerning the Legislature's authority as to Michigan's employees. On the other hand, Article 11, Section 5 was enacted with a specific purpose of defining the CSC's sphere of authority and establishing, *inter alia*, the CSC's supreme and plenary authority to "fix rates of compensation" and regulate "conditions of employment" for the classified civil service. Under the well-established principle that no provision of the Constitution should be construed to nullify or impair another, *Lapeer Co Clerk,* 469 Mich at 156, Article 4, Section 49 should not be construed to usurp the CSC's exclusive authority under Article 11, Section 5, including the authority to regulate conditions of

employment for classified civil service. Article 4, Section 49 cannot be construed as a legislative usurpation of the CSC's plenary authority to change "the amount, nature, or quality of the [pension] benefit." *Michigan Coalition, supra,* 302 Mich App at 203.

Third, Article 4, Section 48 expressly carves out the civil service from legislative control. Based on that express limitation on legislative power, this Court has held that classified civil service employees are not covered by PERA. *In the Matter of the Petition for a Representation Election Among Supreme Court Staff Employees*, 406 Mich 647, 667-68; 281 NW2d 299 (1979) ("the Legislature may by legislation regulate the employer-employee relationship where public employees, other than civil servants, are concerned." Coleman, CJ, concurring); *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 280-81; 273 NW2d 21 (1978) ("Clearly, the PERA was intended to cover all public employees except for civil service employees specifically excluded by constitutional provision."); *Bd of Control of Eastern Michigan Univ v Labor Mediation Bd*, 384 Mich 561, 566-67; 184 NW2d 921 (1971) ("The public policy of this state as to labor relations in public employment is for legislative determination. The sole exception to the exercise of legislative power is the state classified service, the scheme for which is spelled out in detail in Article 11 of the Constitution of 1963."). *See also, Local 1383, Int'l Ass'n of Fire Fighters v City of Warren*, 411 Mich 642, 655; 311 NW2d 702 (1981) ("The only disputes excepted [from Legislative power under art 4, § 48] are 'those in the *state* classified civil service.'") (emphasis in original).

To sum up the second and third points: the two modern constitutional provisions dealing specifically with employment conditions for public employees – Article 4, Section 48 and Article 11, Section 5 -- were structured to harmonize by drawing a clear dividing line between the Commission's authority concerning the classified civil service and the Legislature's authority as

the people's intent to grant the Legislature with broad sweeping power to control the state employees' conditions of employment. As discussed above, Article 4, Section 49 represents general Progressive Era police powers that sought to provide protections for the state's public employees. Article 4, Section 48, on the other hand, was a new provision added to the 1963 Constitution seeking to provide access to a dispute resolution mechanism for the state's public employees – the only group of people without such access. 2 Official Record of 1961 Const Conv at 2340. The carve out was added simply because the Constitution already provided specific provisions for the classified employees under Article 11, Section 5. *Id.* at 2337.

Sixth, the Court of Appeals in *UAW v Green* erroneously relied on the cases in which the Michigan courts have recognized the proper boundaries of CSC's plenary authority over the classified civil service. First and foremost, the Court of Appeals misread this Court's holding in *Council No. 11* which held that the CSC's sphere of authority did not extend to blanket prohibition of off-duty political activities that did not interfere with job performance. 408 Mich at 406. While drawing the outer limits of the CSC's sphere of authority, this Court in *Council No. 11* reiterated the CSC's plenary authority to "regulate *employment-related activities* involving internal matters such as job specification, *compensation*, grievance procedures, discipline, collective bargaining and job performance..." *Id.* (emphasis added). This Court's holding in *Council No. 11* cannot, and does not, support the outcome that the Legislative authority under Article 4, Section 49 trumped the CSC's rulemaking authority on fair share clauses in collective bargaining agreements.

Other cases cited by the panel-majority in *UAW v Green* similarly fail to support the contention that the Legislature's powers under Article 4, Section 49 trump those of the CSC. The three civil rights cases cited are legally distinguishable. *See, Mich Dep't of Civil Rights ex rel*

to other public employees. The clause on which the panel majority relies to upset that stasis was enacted over a century ago to protect women of delicate constitution from working excessive hours, and it has been largely vestigial for decades.

Fourth, the panel majority's distinction between "enact law" and "regulate" in which a provision with "regulate" is subordinated to the provision with "enact law" is untenable when applied to other provisions of the Constitution containing the word "regulate" and/or "enact law." *See* Article 4, Section 50 (Legislature's power "...to provide safety measures and *regulate* the use of atomic energy developed in the future..."); Article 2, Section 4 (Legislature's power to "enact laws to regulate the time, place, and manner of all nominations and elections..."); and Const 1963, Article 4, Section 43 (Legislature's authority to enact laws "regulating" trust companies and corporations for banking). Simply stated, there is no meaningful distinction between "enact" and "regulate" that renders the CSC's constitutional authority over conditions of employment subordinate to the Legislature's authority. More fundamentally, the use of the word "regulate" to establish the Commission's authority concerning conditions of employment could not have signified to the ratifiers that the Commission's regulatory role would be subordinate -- simply to implement legislative imperatives. The whole point of the Constitution's civil service provision was to establish a classified civil service independent from legislative control.

Fifth, the Court of Appeals in *UAW v Green* relied heavily on the distinction between Article 4, Section 48 which contains a carve out for the classified civil service (see discussion above), and Article 4, Section 49, which does not. Ignoring the fact that PA 349 amended Public Employment Relations Act, MCL 423.201 *et seq.*, which was enacted pursuant to the Legislature's authority under Article 4, Section 48 -- not Section 49 -- the Court of Appeals in *UAW v Green* proceeded to conclude that the lack of carve-out in Article 4, Section 49 evidenced

Jones v Dep't of Civil Serv, 101 Mich App 295; 301 NW2d 12 (1980); *Marsh v Dep't of Civil Serv*, 142 Mich App 557; 370 NW2d 613 (1985) and *Walters v Dep't of Transp*, 148 Mich App 809; 385 NW2d 695 (1986). In each, unlike here, the Legislature was under an express mandate to enforce the equal protection clause under Article 5, Section 29 of the Constitution. The Court of Appeals in these cases recognized specific countervailing constitutional provisions, and curtailed the CSC's authority concerning workplace discrimination. There is no specific constitutional provision that conflicts with the CSC's authority under Article 11, Section 5 that mandated the Legislature to enact PA 349 or PA 264. Neither PA 349 nor PA 264 involved a countervailing constitutional provision that might otherwise require the CSC's sphere of authority to be subordinated to the Legislature's authority.

Finally, the Court of Appeals in *UAW v Green* made a critical error concerning the provision that authorized the Legislature to enact PA 349. It is undisputed that PA 349 amended parts of PERA. This Court has found that the Legislature enacted PERA pursuant to the authority under Article 4, Section 48. *Local 1383, Int'l Ass'n of Fire Fighters v City of Warren, supra,* 411 Mich at 651 ("Acting pursuant to this explicit constitutional authorization [Article 4, Section 48], PERA was enacted by the Legislature in 1965."). *See also, AFSCME Council 25*, 292 Mich App at 85. Based on this Court's ruling, and because Article 4, Section 48 exempts the state classified service, the Court of Appeals had correctly concluded that PERA does not apply to the state classified service. *Bonneville v MCO*, 190 Mich App 473, 477; 476 NW2d 411 (1991) ("classified civil service employees are not covered by the PERA"). Indeed the State (at page 45) admits this. One of many critical errors in *UAW v Green* was in examining the Legislature's authority under the incorrect constitutional provision.

VII. The State's Other Arguments Are Without Merit

A. The framers of Article 11, Section 5 intended for "compensation" to include fringe benefits such as pensions

The State argued in its application for leave at pages 17 and 18 that the ratifiers of Article 6, Section 22 of the 1908 Constitution, and subsequently Article 11, Section 5 of the 1963 Constitution, did not intend to grant the CSC any authority over the classified civil servants' pensions because "2. In 1940, compensation was not understood to refer to pensions." In our response we pointed out that the cases relied upon by the Court of Appeals, 302 Mich App at 200, establish that pension provisions were available to public sector employees when the people of this state added Article 6, Section 22 to the 1908 Constitution in 1940, and when the people ratified Article 11, Section 5. (citing to *Brown v Highland Park*, 320 Mich 108; 30 NW2d 798 (1948) (pension plan in existence since 1918); *Bowler v Nagel*, 228 Mich 434; 200 NW 258 (1924) (pension plan for civil servants in Detroit enacted in 1923, and citing a number of cases concerning government service pension plans); and *Attorney General v Chisholm*, 245 Mich 285; 222 NW 761 (1929) (teacher's retirement system first established in 1915)). The State has now abandoned its argument and replaced it (at pages 17-20) with a new one – "2. In 1940, the phrase 'rates of compensation' was not understood to refer to pensions." The new argument[14] fares no better than the old.

First, neither law nor logic supports this argument. Second, the new argument is contrary to multiple Attorney general opinions cited above and below. Third, we still have the "conditions of employment" provision on which the Court of Appeals relied. 302 Mich App at 203.

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[14] Another new argument (at pages 28-30) is that the ratifiers use of the term "pension" in the 1978 constitutional amendment relating to the state police somehow sheds light on the meaning of "compensation" in Article 11, Section 5. State brief, pages 28-30. It rather obviously does not.

B. The framers of Article 11, Section 5 meant what they wrote in 1963 as the events of 1941-43 confirm

The State further argues, also in various permutations, that the Commission has no authority over any aspect of pension benefits because Article 11, Section 5 does not *expressly* grant the CSC the authority to establish a pension plan for state employees (at page 1) or *expressly* limit the Legislature's purportedly "inherent authority to enact laws governing the retirement of state employees, and any amounts payable thereto." (at page 16). The State argues (at pages 24 and 25) that absent this express grant of authority or limitations, Article 11, Section 5 should be interpreted as granting the Legislature with the plenary power to pass legislation regarding state employee retirement benefits because the framers in 1963 knew that in 1943 the Legislature had enacted the Retirement Act. This argument is devoid of merit for several reasons.

First, there is no rule of interpretation in American or English jurisprudence that would allow such specific, far-reaching, and meaning changing words to be interpreted into what is otherwise a clear and unambiguous constitutional or statutory provision. None. If the framers had wanted to exclude pension benefits from the CSC's sphere of authority and plenary powers under Article 11, Section 5 and bestow plenary power to pass legislation regarding public employee retirement benefits to the Legislature, they could have said so. They did not.

Second, the historical argument makes no sense on its own terms. In 1940 the citizens, by initiating and passing an amendment to the constitution, gave the CSC exclusive control of state employee compensation and all other conditions of employment. They did so, as discussed above, because the Legislature in 1939 had sought to destroy the civil service system. That did not change in 1943. The facts regarding the creation of the retirement system are set forth above.

The retirement system the Legislature enacted in 1943 was initiated by the CSC, which appointed an actuary to draft it and then sent it to the Governor and Legislature for enactment.[15] And the change the Legislature made to a non-contributory retirement plan made in 1974 was made at the direction of the CSC as is described above. That the Commission sought legislative cooperation in creating the retirement system cannot be read to suggest that the Legislature was thereafter authorized to act independently either with regard to retirement benefits or with regard to any other aspect of employee compensation.[16]

The Court of Appeals made this point in *AFSCME Council 25, supra*:

> Moreover, **case law reflects a record of cooperation between the branches of government to abide by the separation of powers as set forth in the Michigan Constitution.** Specifically, when a voluntary layoff program failed to achieve the costs savings necessary to correct any increasing budget deficit, the commission, at the request of another branch of government, temporarily suspended its rules to allow for a six-day layoff program. *Crider*, 110 Mich App at 723-725. This Court upheld the commission's actions, determining that the commission had the exclusive authority to establish the conditions of employment for public employees. Id. at 725.Additionally, in *Mich Ass'n of Governmental Employees*, 125 Mich App at 183-185, the commission at the

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[15] The State repeatedly cherry picks the historical record. For example, in arguing that "fix rates of compensation" means only to establish pay schedules it (at page 20) notes that the Commission enacted such a schedule on 1 July 1941. It ignores the fact that a month before the Commission by rule had mandated the adoption of a contributory retirement system.

[16] It would be a perverse reading of our Constitution to use the Commission's having voluntarily involved the Legislature in the process of creating and modifying the retirement plan both in 1943 and 1974 as evidence that the Legislature by enacting PA 264 with no Commission involvement now has the power to cut the Commission totally out of the process and negate Article 11, Section 5 altogether. And there can be no doubt that it was voluntary on the part of the Commission to involve the Legislature. We know that the Commission before the enactment of the Retirement Act retired state employees on its own. See page 8 above. And we know as a matter of law that the Commission could have established a retirement plan on its own. See the attorney general opinions referred to throughout.

> behest of the state employer, rescinded a five percent wage increase and the addition of vision benefits for some state classified employees. This Court ruled that the commission had the authority to rescind and defer the proposed increase even after it was considered by the Legislature. *Id.* at 187. **In the present case, there is no evidence that a process of negotiation was even attempted between the commission and the Legislature to achieve cost savings.**

294 Mich App at 25-26 (emphasis added). In enacting PA 264 the Legislature neither cooperated or negotiated with or even sought any input from the Commission.

More important, the State incorrectly frames the issue in making this argument. Ths issue is not an overly broad one of who can "enact" laws relative to pension plans as the State suggests. The Coalition did not, and is not now challenging the constitutionality of the Legislature's authority to enact laws relative to pension plans. The issue is whether in exercising its legislative authority and enacting PA 264 without any involvement of the Commission, the Legislature effectively modified the rate of compensation and conditions of employment for the state's classified employees and usurped the CSC's constitutional authority in the process.

C. *Council No 11, AFSCME* and *Oakley v Dep't of Mental Health* Support the Coalition, Not the State

The State (at page 23) relies on *Council No 11, AFSCME, supra.* As discussed above, this Court in *Council No. 11* held that the CSC was without authority to limit, by rule, the off duty political activity of state employees, holding that a legislative enactment was applicable to them. This Court relied on the First Amendment to the United States Constitution and on its determination that the off duty conduct of state employees was outside of the Commission's responsibility unless it affected their on duty job performance. While this case shows that there are limits on the Commission's power, those limits are not on the Commission's power to fix rates of compensation or other conditions of employment, which was affirmed:

> We do not question the commission's authority to regulate employment related activity involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance, including the power to prohibit activity during working hours which is found to interfere with satisfactory job performance.

408 Mich at 406-407.

Similarly, the State (at pages 26 and 40) argues that *Oakley v Dep't of Mental Health*, 136 Mich App 58; 355 NW2d 650 (1984) supports the constitutionality of PA 264. In *Oakley*, the Court held that disability compensation for injured employees was neither a "compensation" nor "condition of employment" under Article 11, Section 5, and the supplemental benefits provision of the Mental Health Code did not infringe on the Commission's sphere of authority. *Id.* at 63-64. The *Oakley* Court also noted that disability compensation could properly be viewed as merely a method to provide for "the general welfare of the people of the state" under Article 4, Section 51. *Id.* The crucial distinction from *Oakley* in this case is an absence of competing constitutional provision; the benefits at issue in *Oakley* were outside of the CSC's sphere of authority and did not trigger Article 11, Section 5 concern. In contrast, the pension benefits affected by PA 264 are clearly compensation and/or condition of employment, and are decidedly within the CSC's constitutional authority.

D. Stone v State is not on point

The State (at pages 33 and 34) argues that *Stone v State*, 467 Mich 288; 651 NW2d 64 (2002) supports the proposition that legislation that does not change rates of compensation is valid. First, *Stone* did not involve the constitutionality of legislation at all, let alone Article 11, Section 5. Rather plaintiffs there were arguing that the Retirement Act prohibited the withholding of taxes on monthly accumulated sick leave payments when they retired under a

special early retirement program. *Stone,* 467 Mich at 290. This Court simply held that sick leave payments were not under the relevant statute tax exempt. And there was no even arguable reduction in compensation or adverse changes in any conditions of employment because the retirement program at issue enhanced the retirement benefits and was voluntary.

E. The "rates of compensation" argument is without merit

The State (at pages 31 to 35) argues that PA 264 does not change any rates of compensation. It does if one recognizes that fringe benefits, including pension benefits, are compensation. And both the Commission and the Attorney General have repeatedly recognized this as is described in detail above. The Court of Appeals correctly rejected this argument, finding that "rates of compensation" included pension plan offered as part of the compensation package, and changing the nature of the plan changes the nature of the benefit, amounting to change in the rate of compensation or in the conditions of employment. 302 Mich App at 200-03. Indeed this Court recently recognized that a pension benefit is a form of deferred compensation. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich 295, 311; 806 NW2d 683 (2011) (quoting with approval from the Constitutional Convention record as relating to Article 9, Section 24 of the 1963 Constitution).

F. **Article 9, Section 24 of the Michigan Constitution does not apply**

The State (at pages 23 to 25) makes two arguments based on Article 9, Section 24 of the Michigan Constitution.

First, it argues that Article 9, Section 24 recognized the existing retirement system, that it required employee contributions and that the framers therefore accepted a retirement system funded in part with employee contributions. Four points. First, the Commission created the then existing retirement system as described above. The Commission played no role in PA 264.

Second, the 1943 legislation created a benefit for employees. PA 264 takes a benefit away. Third, the 1943 legislation at MCL 38.36 was by its terms agreed to between the Legislature and the employees. There is no such agreement in or to PA 264. Nor was there any such agreement in 2010 PA 185, a point made by the Court of Appeals in striking it down. *AFSCME Council 25,* 294 Mich App at 22. Fourth, the framers chose a rather odd way to put a proviso into Article 11, Section 5 excluding retirement benefits from the reach of the Commission -- by indirectly making reference to retirement benefits in another section of the constitution.

Citing to *Advisory Opinion re Constitutionality of 1972 PA 294,* 389 Mich 441, 663 (1983), the State (at page 24) argues that Article 9, Section 24 permits the Legislature to attach new conditions prospectively, including the four percent contribution requirement under PA 264. Again, the State misses the fundamental principle of constitutional interpretation: Article 9, Section 24 cannot be interpreted to impair or nullify the CSC's plenary authority under Article 11, Section 5. The prohibition on legislative impairment of accrued financial benefits under Article 9, Section 24 does not grant carte blanch authority to the Legislature to alter the rates of compensation or conditions of employment for the state classified service through prospective changes in pension benefits.

G. **Article 4, Section 51 of the Michigan Constitution does not apply**

The State (at pages 25 to 28) argues that Article 4, Section 51 of the Michigan Constitution which gives the Legislature the authority to enact laws for "the general welfare," gives it the authority to enact PA 264. The Legislature is powerless to enact general welfare laws that are in conflict with constitutional provisions that limit its authority. *Kent County Prosecutor v Kent County Sheriff* 425 Mich 718; 391 NW2d 341 (1986). The cases cited and discussed by

the State in support of this contention – civil rights and others cases discussed above – are legally and/or factually distinguishable and provide no support for the State's contention.

H. **The Retirement Act provisions for the purchase of credited service are irrelevant**

The State argues (at pages 37 and 38) that because it currently allows employees in the defined benefit plan to purchase service credit PA 264's requirement that employees pay four percent of their compensation to remain in the defined benefit plan is constitutional as it also amounts to no more than acquiring credited service by paying for it. The State ignores the obvious difference that PA 264 amounts to the Legislature reducing compensation and affecting a condition of employment by making the employee pay for a fringe benefit that was previously paid by the employer. That is a matter for the Commission, not the Legislature acting alone. If this Court were to find that this legislation violates Article 11, Section 5 it would not be striking down all statutory provisions providing for the purchase of service credit, it would be striking down this specific legislation not because it provided for the purchase of service credit but because it reduced compensation and affected conditions of employment.

VIII. The State's Criticisms of the Court of Appeals' Decision Are Devoid of Merit

The State's multiple criticisms of the Court of Appeals' decision are devoid of merit.

First, the State (at pages 33 and 38) reiterates its argument that Section 35a does not require members to contribute anything; based on the alleged "voluntariness" of the contributions. The Court of Appeals found that PA 264, by forcing employees to choose between contributory defined benefit (DB) plan and non-contributory defined contribution (DC) plan, "effectively reduc[ed] the employee's immediate compensation." 302 Mich App at 195. The Court of Appeals proceeded to correctly conclude that PA 264 changed the nature of the benefit, thus changing the rate of compensation, and was therefore, unconstitutional 302 Mich App at

200. PA 264 forced employees to choose between maintaining the membership in DB plan through reduced wages and switching to a less desirable DC plan at no additional cost – there was nothing "voluntary" about the choices imposed on classified state employees.

Second, the State (at pages 32 and 33) argues that the Court of Appeals erroneously relied on its decision in *AFSCME Council 25, supra*. Again, it argues that the contributions required by PA 264 are voluntary, unlike those required by PA 185. It also argues that in *AFSCME Council* the Legislature was acting to balance the budget, while here there is no such evidence. This is not a meaningful distinction.

Third, the State argues that the Court of Appeals erroneously relied on this Court's decision (at page 32) in *Kane v City of Flint*, 342 Mich 74, *supra,* and (at page 40) on *Mt Clemens Fire Fighters Union v Mt Clemens*, 58 Mich App 635; 228 NW2d 500 (1975). Specifically, the State argues that these cases are distinguishable and have no binding force. The Court of Appeals properly relied on these cases to support its determination that public pensions were generally considered to be a part of "compensation" in 1940 and again in 1963, and therefore, were intended to be a part of the CSC's authority to fix rate of compensation under Article 11, Section 5.

Fourth, the State (at pages 39 and 40) criticizes the Court of Appeals for examining PA 264 based on "conditions of employment" because that "issue" was never before the Court of Claims. The argument is meritless. We raised it in our complaint. And the constitutionality of a statute is reviewed *de novo*. *Tolksdorf v Griffin*, 474 Mich 1, 5; 626 NW2d 163 (2001). The State admits that we presented this argument in our brief to the Court of Appeals and the State addressed it in its reply brief. More important, analysis based on "conditions of employment"

was one of the arguments presented to the court in order to decide the "issue" – the constitutionality of PA 264.

Fifth, the State argues that the Court of Appeals erroneously relied on Public Employment Relations Act (PERA), MCL 423, 201 *et seq.*, to support its holding, and admits (at pages 45 and 46) that "[PERA] does not apply to state employees."[17] Arguably true. But the Court of Appeals correctly stated that "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining and are comparable to the "rates of compensation" and "all conditions of employment" under Article 11, Section 5. 302 Mich App at 203. *See also,* CSC Rule 9-1 ("Proper subject of bargaining means rates of compensation and other conditions of employment that are not prohibited subjects of bargaining. Proper subjects of bargaining include both mandatory and permissive subjects of bargaining."). The court's citation to PERA does not in any way undermine its holding that "the calculation of pension benefits is within the authority of the Commission, not the Legislature." 302 Mich App at 203.

Sixth and finally, the State argues (at page 8) that the overtime calculation provision in PA 264 is constitutional because the Retirement Act was amended in the same respect in a manner favorable to classified employees in 1987 without any Commission approval and without resultant litigation. As to there being no Commission approval, the State relies on Commission minutes (App 89a-99a) for 11 June 1987 that read that retirement legislation was passed "After several months of negotiation . . .." Who the negotiating parties were is not stated. This is hardly evidence that the 1987 changes were enacted without input from the Commission. The State also

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[17] This is a significant admission by the State and undercuts its reliance on *UAW v Green*. PA 349 amended PERA to prohibit fair share arrangements under the collective bargaining agreements. The State's admission that PERA does not apply to state employees constitutes an admission that PA 349 does not apply to the classified civil service, and that more important, the analysis from *UAW v Green* is inapplicable to this case.

asserts (at pages 34 and 35 and footnote 4) that the constitutionality of mandatory contribution to the Michigan Public School Employees Retirement System under MCL 38.1343a has not been challenged. As to the lack of litigation, that proves nothing. *AFSCME Council 25*, 294 Mich App at 27. And it is hardly surprising that classified employees chose not to litigate a change that was to their benefit. Nor is there any legal principal that would require this as a predicate for them bringing this action now.[18]

CONCLUSION

This is a garden variety Article 11, Section 5 case. It should be decided as have the multiple other such cases over the past seventy years. The Court of Appeals correctly followed that precedent in deciding that PA 264, to the extent it eliminates a non-contributory defined pension benefit and changes the overtime calculation for defined benefit pensions for classified employees, conflicts with Article 11, Section 5 because it fixes "rates of compensation" and regulates "conditions of employment."

UAW v Green is inapposite. *UAW v Green* is not on point. PA 264 is not a law of general applicability. Nor does it concern an issue uniquely within the province of the Legislature. And it was wrongly decided.

This Court should affirm the Court of Appeals determination that Public Act 264 of 2011 violates Article 11, Section 5 by eliminating a pension benefit and changing the overtime calculation and remand to the Court of Claims for a severability determination.

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[18] The State's argument (at pages 33 and 34) that striking down PA 264 will result in nullification of all previous amendments to PA 240 borders on the ridiculous. As the Court of Claims correctly noted during the hearing on 28 November 2012 on plaintiffs-appellees' motion for partial summary judgment, the constitutionality of all other amendments to PA 240 is not before the courts in this case, and there is no evidence concerning whether the CSC had any input or consent – tacit or otherwise - with each of these amendments. (App 161a-162a.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

ATTORNEY GENERAL, Plaintiff–Appellant,
v.
CIVIL SERVICE COMMISSION and State Personnel Director, Defendant–Appellees,
United Auto Workers and United Auto Workers Local 6000, Amicus Curiae.

Docket No. 306685. | Jan. 8, 2013.

Synopsis

Background: Attorney General brought action against Civil Service Commission and State Personnel Director, challenging decision to extend eligibility in the State Health Plan (SHP) to other eligible adult individuals (OEAI), who were co-residents of state employees and non-exclusively represented employees (NERE). The Circuit Court, Ingham County, ruled in favor of defendants. Attorney General appealed.

Holdings: The Court of Appeals held that:

[1] extension of SHP to OEAI did not violate Marriage Amendment;

[2] extension of SHP to OEAI did not violate Equal Protection Clause; and

[3] extension of SHP to OEAI qualified as compensation such that Commission had authority to implement the policy.

Affirmed.

Riordan, J., dissented and filed opinion.

Ingham Circuit Court; LC No. 11–000538–CZ.

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right from the order of the circuit court granting defendants' motion for summary disposition and denying plaintiff's motion for same.[1] This dispute concerns the constitutionality of defendants' decision to extend eligibility in the State Health Plan (SHP) to "other eligible adult individuals" (OEAI benefits), who were co-residents of state employees and nonexclusively represented employees (NEREs). We affirm.

[1] The underlying gravamen of plaintiff's challenge is that this case entails a violation of the "Michigan Marriage Amendment," Const 1963, art 1, § 25, and our Supreme Court's decision in *National Pride at Work v. Governor,* 481 Mich. 56, 748 N.W.2d 524 (2008). Apparently, it is plaintiff's underlying belief that defendants' decision, after extensive negotiation with the unions, to permit unmarried employees to share their health care benefits with another unrelated person is an attempt to circumvent Michigan's prohibition against recognizing any "agreement" other than "the union of one man and one woman in marriage" as "a marriage or similar union for any purpose." Const 1963, art 1, § 25. Our Supreme Court has recently held in *Nat'l Pride at Work* certain "domestic partnership policies" specifically and explicitly intended to confer benefits on same-sex partners violated the Marriage Amendment. The policies at issue here, however, are significantly different.

Critically, *Nat'l Pride at Work* entailed policies that were specifically and explicitly intended to confer benefits on same-sex partners in close relationships with the employees. See *Nat'l Pride at Work,* 481 Mich. at 63–67, 748 N.W.2d 524. Our Supreme Court concluded that the domestic partnerships under discussion were being treated as "marriage[s] or similar union[s]" within the meaning of the Marriage Amendment. *Id.* at 86–87, 748 N.W.2d 524. However, although our Supreme Court concluded that the Marriage Amendment precluded recognition of domestic partnerships for purposes of providing health-care benefits, our Supreme Court did *not* resolve that health-care benefits are a specific benefit of marriage or that the Marriage Amendment somehow precludes employers from offering health-care benefits to people other than

spouses of employees. See *id.* at 78 n. 18, 748 N.W.2d 524. Consequently, there is no absolute prohibition against same-sex domestic partners receiving benefits through their relationship with an employee *so long as* that receipt is not based on the employer's recognition of that relationship as a "marriage or similar union."

In contrast to the policies under discussion in *Nat'l Pride at Work,* the policy at issue here is, in relevant part, as follows:

> Where the employee does not have a spouse eligible for enrollment in the [SHP], the Plan shall be amended to allow a participating employee to enroll one Other Eligible Adult Individual, as set forth below:

To be eligible, the Individual must meet the following criteria:

***2** 1. Be at least 18 years of age.

2. Not be a member of the employee's immediate family as defined as employee's spouse, children, parents, grandparents or foster parents, grandchildren, parents-in-law, brothers, sisters, aunts, uncles, or cousins.

3. Have jointly shared the same regular and permanent residence for at least 12 continuous months, and continues to share a common residence with the employee other than as a tenant, boarder, renter or employee.

Dependents and children of an Other Eligible Adult Individual may enroll under the same conditions that apply to dependents and children of employees.

In order to establish that the criteria have been met, the employer will require the employee and Other Eligible Adult Individual to sign an Affidavit setting forth the facts which constitute compliance with those requirements.

This policy is unambiguously completely gender-neutral. Furthermore, while it does not allow married employees to share their benefits with anyone other than spouses and does not allow employees to share their benefits with close blood relations, it does not depend on the employee being in a close relationship of any particular kind with the OEAI beyond a common residence. The Marriage Amendment prohibits recognizing certain kinds of agreements as "marriage[s] or similar union[s];" it does not in any way prohibit incidentally benefiting such agreements, particularly where it is clear that an employee here could share benefits with a wide variety of other people.[2]

Plaintiff also asserts a violation of the Michigan Equal Protection Clause. Const 1963, art 1, § 2. The scope and standard of the Michigan Equal Protection Clause are coextensive with those rights protected by the federal Equal Protection Clause. *Doe v. Dep't of Social Servs.,* 439 Mich. 650, 670–674, 487 N.W.2d 166 (1992); see U.S. Const, Am 14. While equal protection generally requires that similarly situated individuals be treated similarly, "it is well established that even if a law treats groups of people differently, it will not necessarily violate the guarantee of equal protection." *Id.* at 661, 487 N.W.2d 166. Accordingly, not all discriminatory classifications will be held to violate the Equal Protection Clause. *Harvey v. State,* 469 Mich. 1, 6–7, 664 N.W.2d 767 (2003). Unless the action infringes on a fundamental right, discriminates against a "suspect" classification (such as race, ethnicity or national origin), or discriminates against a "quasi-suspect" classification invoking intermediate scrutiny (gender or illegitimacy), the state action is analyzed under rational basis review. *Id.* at 7, 12, 664 N.W.2d 767.

"[M]arital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause," as it is not a suspect class and the state may have good reason for discriminating on the basis of marital status. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 Pa. 38, ,* 490 Mich. 295, 328 n. 34, 806 N.W.2d 683 (2011). Indeed, "[s]uspect classes are those that have been subjected to a history of purposeful unequal treatment, or have been relegated to a position of political powerlessness requiring protection." *Wysocki v. Kivi,* 248 Mich.App. 346, 366, 639 N.W.2d 572 (2001). Although the right to marry is a protected fundamental right, the OEAI benefits policy in no way impairs public employees' right to marry. *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Zablocki v. Redhail,* 434 U.S. 374, 383–387, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). The Civil Rights Act (CRA), MCL 37.2101 *et seq.,* did not expand the list of suspect classifications granting heightened scrutiny in the Michigan Equal Protection Clause to include marital status. *Dep't of Civil Rights ex rel Forton v. Waterford Twp. of Parks and Recreation,* 425 Mich. 173, 189–190, 387 N.W.2d 821 (1986) (noting that CRA expanded the scope, not the standard, of the guarantees in the Equal Protection Clause).

***3** Likewise, the United States Supreme Court has acknowledged several familial association rights that were

protected under the federal Constitution, including: (1) the right to parent children without interference from the state; (2) the right of family members to reside together; and (3) the right to procreate. *Zablocki,* 434 U.S. at 386; *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 504–506, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Meyer v. Nebraska,* 262 U.S. 390, 402–403, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). However, close relatives are not a suspect/quasi-suspect classification that warrants heightened judicial scrutiny. *Lyng v. Castillo,* 477 U.S. 635, 638, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986). The *Lyng* Court also held that discriminatory economic policies against close relatives regarding the provision of benefits does not implicate fundamental rights, unless doing so directly and substantially prevents family members from living together. *Id.* at 638–639. Additionally, close relatives are not a class of persons that has suffered a history of "purposeful unequal treatment," or are in "a position of political powerlessness." *Wysocki,* 248 Mich.App. at 366, 639 N.W.2d 572.

[2] The policy at issue is strictly gender-neutral and does not in any way implicate race, ethnicity, national origin, or illegitimacy. The policy does not invoke any fundamental right. Consequently, we review defendants' policy under rational basis review.

Plaintiff argues that the policy at issue here violates equal protection by excluding married employees from sharing their benefits with persons other than their spouses and by excluding employees from sharing their benefits with blood relatives. Quite bluntly, we agree wholeheartedly that those restrictions strike us as absurd and unfair. The restrictions excluding married employees from sharing their benefits with persons other than their spouses and excluding employees from sharing their benefits with blood relatives strike us as ridiculous. For example, at oral argument, the situation was posed that an employee could share his or her benefits with a fraternity brother but not an actual brother. Likewise, if a married employee's spouse has his or her own health benefits, that employee would be precluded from sharing his or her benefits with, say, an adult child, or, for that matter, anyone else. Indeed, the assistant attorney general conceded at oral argument that if "everyone was in," the policy would be acceptable. These restrictions are nothing short of ridiculous.

However, our subjective determination of absurdity is not the standard by which we review a policy for an equal protection violation. Under the rational basis standard of review, a state's action will be upheld so long as it is rationally related to advancing a legitimate state purpose. *Id.* at 7, 639 N.W.2d 572. Because statutes or rules are presumed constitutional under rational basis review, the challenger has the burden of showing the action was arbitrary and rationally unrelated to the state interest. *Id.* The state actor's actual motivations are irrelevant, and the action will be constitutional so long as it is supported by "any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id.*

*4 Significantly, "[t]o prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *People v. Idziak,* 484 Mich. 549, 571, 773 N.W.2d 616 (2009) (quotations omitted). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Id.* (quotation omitted). Rather, "[a] rational basis exists for the legislation when any set of facts, either known or that can be reasonably conceived, justifies the discrimination." *Morales v. Parole Bd.,* 260 Mich.App. 29, 51, 676 N.W.2d 221 (2003). Such finding may be based on "rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 316, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). "[I]n other words, the challenger must 'negative every conceivable basis which might support' the legislation." *TIG Ins. Co., Inc. v. Dep't of Treasury,* 464 Mich. 548, 558, 629 N.W.2d 402 (2001), quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (emphasis added). Consequently, our subjective assessment of a policy as seemingly absurd is irrelevant: the question is only whether the policy could plausibly be said to possibly advance any legitimate government interest, an exceedingly low standard.

Under this exceedingly low standard, it is not the place of the courts to second-guess the "wisdom, need, or appropriateness of the" state action. *Phillips v. Mirac, Inc.,* 470 Mich. 415, 434, 685 N.W.2d 174 (2004). As noted above, this is even more important because we agree that defendants had to "draw the line" at some point. *Fritz,* 449 U.S. at 179. Defendants' policy was crafted through negotiation and bargaining with the unions, and pursuant to the negotiations the policy excluded married persons and close relatives. The exclusion of the cited groups from the OEAI benefits policy does not clearly demonstrate that the policy is arbitrary or unrelated to the state's interests. The policy appears to serve the negotiated, bargained-for needs of the individuals

affected, and so we conclude that the policy passes muster under rational basis scrutiny. We do hope, however, that defendants will see fit and be able to strengthen the policy by eliminating the exceptions we have discussed. [3]

Plaintiff also contends that defendants lack the constitutional authority to implement the OEAI benefits policy. We disagree.

The Michigan Constitution delegates plenary and exclusive authority to defendants in order to set compensation and conditions of employment for public employees. Const 1963, art 11, § 5; *AFSCME Council 25 v. State Employees Retirement Sys.*, 294 Mich.App. 1, 15, 818 N.W.2d 337 (2011). Defendants' authority to set compensation is within the scope of their constitutionally delegated authority, which is only subject to other constitutional limitations, like equal protection, that were established when the Michigan Constitution was adopted. *AFSCME Council 25*, 294 Mich.App. at 8, 818 N.W.2d 337; *Hanlon v. Civil Serv. Comm.*, 253 Mich.App. 710, 718, 660 N.W.2d 74 (2002).; Const 1963. When the people of Michigan ratified the Michigan Constitution in 1963, the rights guaranteed under the Equal Protection Clause did not include "marital status," so this limitation is not constitutionally binding on defendants. Because the CRA is a matter of statutory law, it lacks the authority to impair defendants' authority. MCL 37.2102, 1976 PA 453. Holding otherwise would allow the Legislature to circumvent the Michigan Constitution and bypass defendants' constitutional mandate.

***5** Plaintiff also argues that the OEAI benefits do not constitute "compensation" under Const 1963, art 11, § 5. This Court has defined "compensation" under this constitutional provision as meaning "something given or received for services, debt, loss, injury, etc." *AFSCME Council 25*, 294 Mich.App. at 23, 818 N.W.2d 337. Although our Supreme Court has never decided whether health insurance qualifies as compensation, it has held in a different context that some fringe benefits (including pensions, clothing allowances, and life insurance premiums) are "compensation" because they were "not a gratuity, but a part of the stipulated compensation" pursuant to their contracts. *Kane v. City of Flint*, 342 Mich. 74, 80–83, 69 N.W.2d 156 (1955).

This Court previously held in an older case that "hospitalization, medical, and dental insurance should not be included" as compensation. *Gentile v. Detroit*, 139 Mich.App. 608, 618, 362 N.W.2d 848 (1984). Although this decision is no longer binding on this Court pursuant to MCR 7.215(J)(1), it is nevertheless persuasive in terms of interpreting the meaning of "compensation." However, both *Kane* and *Gentile* have limited value in resolving this legal question, as those cases involved the definition of "compensation" as used in their respective city ordinances. *Kane*, 342 Mich. at 76, 69 N.W.2d 156; *Gentile*, 139 Mich.App. at 612–613, 362 N.W.2d 848.

[3] Relying on the only published authority in Michigan interpreting the meaning of "compensation" in our Constitution, the OEAI benefits qualify as compensation because they are provided in exchange for services rendered by public employees. This is consistent with the dictionary definition found in Random House Webster's College Dictionary (2001 ed) of "something given or received for services, debt, loss, injury, etc." It is also consistent with the dictionary definition found in Black's Law Dictionary (8th ed) of "[r]enumeration and other benefits received in return for services rendered; esp., salary or wages" but noting that such disparate things as stock options, profit sharing, vacations, medical benefits, and disability can also be compensation. We perceive no reason to artificially limit the definition. These benefits were obviously of value to the employees, because they were specifically negotiated for by the unions —consequently, they certainly appear to be part of what the workers expect to receive in exchange for their labor. As noted earlier, it is reasonable to believe that eligibility in the SHP would attract potential employees or retain existing ones. Therefore, these benefits are not gratuities or perks, but are rather compensation for services rendered.

In summary, we find that the benefits-sharing policy at issue in this case is within defendants' authority to implement, does not violate equal protection and does not violate the Marriage Amendment. The trial court is therefore affirmed.

RIORDAN J. (dissenting).

***5** For the reasons set forth below, I respectfully dissent from the majority's opinion.

***6** A rational basis standard of review is highly deferential and compels "a challenger [to] show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *Crego v. Coleman*, 463 Mich. 248, 259, 615 N.W.2d 218 (2000) (quotation marks and citation omitted). "A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably

be assumed, even if such facts may be debatable." *Heidelberg Bldg., LLC v. Dep't of Treasury,* 270 Mich.App. 12, 18, 714 N.W.2d 664 (2006).

There are no facts in the record to support the trial court's conclusory holding that the OEAI provision is, or is not, supported by a rational basis. Despite the attorney general's contention that the proffered reasons were illogical, the trial court performed no inquiry into whether they were supported by anything, even if debatable, in the record. Instead, the trial court simply adopted the proffered justifications as being factual.

Undoubtedly, a rational basis standard of review is highly deferential. However, that deference is not the equivalent of there being no standard of review at all. A court may not abdicate its duty to actually review the proffered justifications and any opposition to them. It must discern whether there is anything in the record to undermine or, in the alternative, support the justifications. From my review of the record, it cannot be said that the OEAI provision is directed at any identifiable purpose or discrete objective in relation to the proffered goal of attracting and retaining a qualified work force.

Further, if the purpose of the OEAI provision is to attract and retain a qualified work force, there is no rational basis to arbitrarily draw the line between unmarried and married employees or related and unrelated individuals. This arbitrary distinction is irrational, as there is nothing in the record to suggest that unmarried individuals or individuals with unrelated cohabitants are somehow more qualified, superior employees or that it is much more difficult for the State to attract such persons to become employees and then retain them. In essence, "[t]he *breadth* of the [provision] is so far removed from these particular justifications that" it is "impossible to credit them." *Romer v. Evans,* 517 U.S. 620, 635, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (emphasis added).

While honoring the collective bargaining process certainly is important, it cannot be done in violation of the constitution. The OEAI provision endorses an arbitrary distinction between classes of people based on familial relations, with no rational basis and no factual basis for such a distinction. Thus, it is a status-based enactment divorced from any factual context from which could be discerned a relationship to legitimate state interests. *Romer,* 517 U.S. at 635. "[I]t is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

*7 Equal protection is not achieved through the indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status, or general hardship, are rare. *Romer,* 517 U.S. at 633. Because the OEAI provision makes it impermissible for one group of citizens, as opposed to another, to receive a government benefit, without there being any identifiable, rational basis for doing so, it is a denial of equal protection under the law.

For these reasons, the OEAI provision "is arbitrary and wholly unrelated in a rational way to the objective of the [provision]." *Crego,* 463 Mich. at 259, 615 N.W.2d 218. As it is written, the OEAI provision is unlawful and the lower court's opinion should be reversed.

Footnotes

1 Plaintiff unsuccessfully sought leave from our Supreme Court to bypass this Court's opportunity to consider the issues presented in this appeal. *Attorney General v. Civil Serv. Comm.,* 491 Mich. 875, 809 N.W.2d 569 (2012).

2 For example, an employee could share benefits with a same-sex boyfriend or girlfriend, but the same employee could also share those benefits with an opposite-sex boyfriend or girlfriend, or with a nonromantic best friend, or a mere housemate. We would not think it impossible, or even unlikely, that any two people of any sex might share a friendship close enough to give rise to a shared domicile and a desire to share health care benefits. Considering the present state of the economy and prevalence of shared housing for reasons that may involve simple economics, we think it unreasonable to predict same-sex domestic partnerships to necessarily be the most-benefitted group under this policy.

3 It is worth pointing out that the restriction on OEAIs being co-residents of the employees has not been challenged as in any way unreasonable. One could make the argument, at least in theory, that the policy discriminates against people in long-distance relationships. However, again, defendants do have to "draw the line" somewhere.

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